FILED
JUL 8
JAMES R. BROWNING, C

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 88

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
MERLE M. MCCURDY,
Assistant Prosecuting Attorney,
Criminal Courts Bldg., Cleveland, Ohio,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

TABLE OF CONTENTS.

Objections to Jurisdiction 1

Questions Presented 2

Statement of the Case 3

Argument 5

Reasons for Not Granting the Writ 5

Conclusion 8

TABLE OF AUTHORITIES.

Cases.

Cole v. Arkansas, 333 U. S. 196 6

Crobaugh v. State, 45 O. App. 410 7

Maresette v. United States, 342 U. S. 246 7

Searles v. State, 3 O. C. D. 478 7

Waters-Pierce Oil Company v. Texas, 212 U. S. 86 3

White v. State, 245 S. W. (2d) 704 5

Constitution.

Constitution of the United States, Amendment XIV 3

Statutes.

Revised Code of Ohio, Sec. 2917.01 2

28 U. S. C. Section 1257(3) 3

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 971.

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court.

No one of the decisions of this Court, relied upon by the petitioner in his application for this writ, supports his claims in this case, as will be more fully developed below.

The questions presented herein were raised both in the Court of Appeals of Cuyahoga County and the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused to certify and review.

The decisions of the state courts were based on state law. There is, therefore, no substantial federal question involved.

QUESTIONS PRESENTED.

The petitioner was charged with violating section 2917.01 of the Revised Code of Ohio, which reads in part:

> "* * * No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him."

The petitioner was indicted November 20, 1957 under the above-cited statute, the pertinent part of the indictment reading as follows:

> "* * * Do Find and Present, That Sam Bernstein on or about the 17th day of September 1957, at the County aforesaid, was a Building Inspector with the Building Department of the City of Cleveland, a municipal corporation, and being then and there a duly appointed, qualified and acting inspector, officer, employee and agent of the City of Cleveland and with reference to matters pending and that might legally come before him as such inspector, officer, employee and agent of the said City of Cleveland, did unlawfully and corruptly solicit and accept from Mabel L. Igoe and Hugh Igoe a sum of money in the amount of $100.00 to influence the action, opinion and judgment of the same Sam Bernstein with respect to his official duties in the enforcement of and in carrying out the laws of the State of Ohio and the charter provisions and ordinances of the City of Cleveland. * * *"

Most of the five questions presented by the petitioner have to do with evidentiary matter and it is claimed that lack of sufficient proof upon which to base a conviction is ground for review by this Court under the "due process"

clause of Article XIV of the Amendments to the Constitution of the United States.

The question of whether there was sufficient proof to warrant the conviction was resolved in the state courts and this Court has no jurisdiction to review this question under 28 U. S. C. section 1257(3).

In the case of *Waters-Pierce Oil Company v. Texas*, 212 U. S. 86, it was held:

> "The jurisdiction of this court to review the proceedings of the State courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the State court and denied by the rulings and judgment of that court."

The only question presented here is whether this Court has jurisdiction to review this case under the questions presented in petitioner's brief.

STATEMENT OF THE CASE.

Some time prior to August 29, 1957 Sam Bernstein, a building inspector for the City of Cleveland, was given an assignment to investigate a complaint of violation at 13425 Casper Road, the home of Hugh and Mabel Igoe. On August 29, 1957 Bernstein, the petitioner and defendant, went to this residence and found a violation existing in that on each of the three floors there were complete living quarters although the area was zoned for two-family residences. The petitioner informed the owners of the violation and said they would have to comply with the law and that he would return the following Tuesday to make another inspection.

The Igoes then proceeded to evict the tenants on the third floor and to disconnect the cooking facilities and the kitchen sink. When the petitioner returned on September 3, 1957, he told the Igoes that perhaps he could work out a deal whereby they could continue the violation but it would cost them approximately $200. The Igoes said they would have to think it over. Bernstein told them he would be back in a week or two.

The petitioner returned on the 13th of September and said to Mr. Igoe, "Would you like to pay me something now or wait until a later date, and pay me all at once?" Mr. Igoe informed him that Mrs. Igoe was not at home and he would have to come back at a later date, which Bernstein agreed to do.

The Igoes then went to the police and told them what was happening. The police gave them $50 in marked money and instructed them to pay this to the petitioner at a time when it was arranged that detectives would be concealed in the Igoe home.

On September 17th the detectives went to the Igoe residence and concealed themselves in bedroooms adjacent to the dining room. Upon the petitioner's arrival he was invited by Mrs. Igoe to be seated at the dining room table so they could discuss the matter further. In the course of the conversation Mr. Igoe asked, "If we pay you this money what assurance do we have that you won't come back and ask for more?" The defendant answered, "You have no assurance. You are taking a chance on that the same as I am taking a chance on losing my job."

Mrs. Igoe then handed the marked $50 to the petitioner, who told her to lay it on the table, which she did. The petitioner then picked it up, counted it, and laid it back on the table, saying, "I can't accept only fifty; you said half of it; it has to be a hundred dollars; this will take care of the people at City Hall."

Mr. Igoe then went into a bedroom and procured another $50, which the petitioner counted. The petitioner told the Igoes, "This will take care of the people at City Hall. I will come back at a later date for the other money, which will be mine." At this point the detectives came into the room and arrested the petitioner.

ARGUMENT.

Reasons for Not Granting the Writ.

1. It is contended by the petitioner that he did not accept any money from the prosecuting witness.

This is purely a question of fact and was raised and considered by the reviewing courts of Ohio. These courts determined that there was a solicitation and acceptance of the money involved.

The petitioner cites *White v. State*, 245 S. W. (2d) 704, which holds that both solicitation and acceptance of the money must be proved. There is no question but what that is the law. This same cited case was argued in the Appellate Courts of Ohio and considered by them before their final judgments were rendered.

2. It is contended that the jury was authorized to convict for the intent and acts of the prosecuting witnesses under the charge of the court when the court said "that if the object of its offering and payment (by the Igoes) was to influence the defendant in the performance of his official duties as a building inspector, the offense of bribery was complete."

The State did not base its prosecution of the petitioner on the intentions of the Igoes. The evidence as disclosed by the record is that the petitioner Bernstein solicited and accepted a bribe; that pursuant to their conversations with the petitioner the Igoes paid the money to

him presumably to influence him in the performance of his official duties as a building inspector. It was imperative that the money be paid for that specific purpose. The above-quoted instruction upon which petitioner makes this claim of error is taken completely out of context since the court also charged that it was incumbent upon the State to prove beyond a reasonable doubt that the petitioner solicited and accepted the said thing of value, to-wit, money, from Mabel L. Igoe and Hugh Igoe to influence him with respect to his official duties as a building inspector in the enforcement of the laws of the State of Ohio and the ordinances of the City of Cleveland then and there in effect. We submit that when the entire charge of the court is taken into consideration, this claim of error has no foundation.

Petitioner cites 333 U. S. 196, *Cole v. Arkansas*. Clearly this case has no application here. In that case the petitioner was tried and convicted under information charging him only with violation of section 2 of a state statute. He appealed to the State Supreme Court contending that section 2 was contrary to the Federal Constitution. Without passing on that question the State Supreme Court sustained the conviction on the ground that the evidence showed that the petitioner had violated section 1 of the same statute which describes an entirely different offense. This Court held that the petitioner was denied due process of law and reversed the judgment and remanded. There is no such question at issue in the instant case.

3. The petitioner contends that an undue burden was put on him when the court charged the jury "it is a rule of law that every sane person intends the natural and probable consequence of his voluntary acts, unless the evidence is such as to show a lack of intent."

Petitioner says further that this is a presumption of fact. We contend that it is a presumption of law.

While this portion of the court's charge is a correct statement of law, had the court omitted it entirely neither the prosecution nor the petitioner would thereby have been prejudiced. Its inclusion, even as surplusage, likewise did not constitute error and the petitioner was in no way damaged by such inclusion.

In *Searles v. State*, 3 O. C. D. 478, cited by petitioner, the court charged, in part, "should you find * * * that the natural and probable consequence of its (building) being burned would be to prejudice, damage or defraud such insurance company, then you will find such burning to be with the intent to prejudice, damage and defraud such company." The appellate court held such charge erroneous as tending to mislead the jury into misapplying a general rule of law and as treating the presumption alluded to as conclusive. In the case here on appeal, however, the charge did not tend to mislead the jury. It was at most a statement of a general rule of law. Nowhere did the court say or infer that this rule of law is conclusive for it qualified the statement by adding "unless the evidence is such as to show a lack of intent."

As to *Crobaugh v. State*, 45 O. App. 410, cited by petitioner, there the court went further than the portion of the charge quoted in petitioner's brief by adding, "All the state has to prove are acts the natural and probable consequences of which are to deceive."

The petitioner cites 342 U..S. 246, *Maresette v. United States*. This case arose out of a larceny of federal property. The trial court instructed the jury that the law raises a presumption of intent from the single act of stealing. This Court said:

> "As we read the record, the case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court, (b) as a presump-

tion of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. * * *

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

This case, we contend, has no application to the instant case.

In petitioner's question No. 4, he alleges that, "The Court charged the jury that because alleged entrapment may be in a case, therefore the guilt of the defendant (petitioner) is thereby to be assumed by the Jury."

The petitioner has neither quoted any portion of the charge nor cited any page in the record or other reference to entrapment. We cannot find any place in the charge of the court as set forth in the record where the court made any such charge.

CONCLUSION.

In conclusion, we submit that there is no substantial federal question involved, and that there is no debatable constitutional question involved herein, and that under the questions presented in the petitioner's brief this Court has no jurisdiction to review this case and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
MERLE M. MCCURDY,
Assistant Prosecuting Attorney,
Criminal Courts Bldg., Cleveland, Ohio,
Attorneys for Respondent.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted]

SAM BERNSTEIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF PETITIONER IN REPLY.

SAM BERNSTEIN,

Petitioner.

SEYMOUR A. TERRELL,

Society National Bank Bldg.,
Cleveland, Ohio,

Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 971.

SAM BERNSTEIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF PETITIONER IN REPLY.

JURISDICTIONAL QUESTION PRESENTED BY THE RECORD.

In the Court of Appeals of Ohio, one of the judges found error in the instructions warranting a new trial.

All that is said by respondent under Objections To Jurisdiction is merely gratuitous; merely because the lower courts ignored the Constitutional rights of petitioner cannot overcome the cogent authorities presented in the Petition.

DENIAL OF DUE PROCESS OF LAW PRESENTED.

The petition does not seek jurisdiction on an evidentiary matter, but for a denial of the Constitutional rights, under which the petitioner was convicted without evidence and contrary to the requirements of due process.

RESPONDENT'S STATEMENT OF THE CASE IS NOT ADEQUATE.

It omits the steps which show the scheme to contrive a claim of bribery; and the conclusive fact, that the petitioner could not have received or accepted any money. It is nowhere denied in the record that a specific powder was placed on the Igoes' money, so that whoever touched the same, his hands would show it. The detectives found —on petitioner's arrest, and so testified, that there was —nothing on his (petitioner's) hands, indicating that he had ever taken any money.

REPLY TO ARGUMENT.

1. Respondent cannot claim that there is a mere question of fact, when the record shows conclusively the absence of acceptance of the money.

Since solicitation and acceptance were both required, there could be no conviction, and due process, since that element of the alleged crime was not proved.

2. Respondent cannot evade the effect of the court's charge to the jury that the intent of the Igoes was only necessary to make petitioner guilty (see page 5, Petitioner's Brief), by saying "the State did not base its prosecution on the intention of the Igoes."

A reading of *Cole v. Arkansas*, 333 U. S. 196, will show its application at bar.

3. Respondent is manifestly unfair, when it says that the charge did not contain the words quoted in Item 2 of petitioner's Questions Presented and referred to also on page 6 of the petition.

4. Respondent cannot evade the authorities on pages 5 and 6 of petition by saying that the petitioner claims the

charge was only of a presumption of fact. Petitioner says that the charge was a charge of presumption of law, so that petitioner was required to prove his innocence, and the State was relieved of the burden. The case is governed by 342 U. S. 246, *Maresette v. United States* which cannot be distinguished.

Respondent knows that the briefs in the Supreme Court of Ohio did contain this item, and there was quoted the charge in the Bill of Exceptions, page 444, and as follows:

> "In support of his plea of not guilty, Sam Bernstein sets up the defense of entrapment. * * * It is a positive defense and necessarily assumes that the act charged was committed."

Respondent is conscious that 287 U. S. 435, *Sorrells v. United States,* holds such a charge violates the petitioner's Constitutional rights, and, therefore, makes the statement in its brief contrary to what is contained in the Bill of Exceptions from which we have quoted above.

Petitioner submits that the petition shows the petitioner has been denied due process of law, and that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAM BERNSTEIN,
Petitioner.

SEYMOUR A. TERRELL,
Society National Bank Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.